APPENDIX A — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT ENTERED OCTOBER 30, 2007

Lippman, P.J., Andrias, Williams, Buckley, Kavanagh, JJ.

1865-1866N

Index 109239/03

NYCTL 1999-1 Trust, et al.,

Plaintiffs-Respondents,

-against-

114 Tenth Avenue Assoc., Inc.,

Defendant-Appellant,

Karen Nason, et al.,

Defendants,

Carlton Capital Corp.,

Intervenor-Respondent.

Order, Supreme Court, New York County (Saralee Evans, J.), entered September 22, 2005, which, to the extent appealed from, denied the motion of defendant 114 Tenth Avenue Assoc., Inc. (114 Tenth Avenue) to vacate the judgment of foreclosure and sale and to set aside the resulting foreclosure sale, and order, same

court and Justice, entered December 20, 2006, which denied 114 Tenth Avenue's motion to renew, unanimously affirmed, without costs.

The court properly denied 114 Tenth Avenue's motion to vacate the judgment of foreclosure and sale. The record establishes that 114 Tenth Avenue was properly served with notice of plaintiffs' foreclosure action in accordance with Business Corporation Law § 306, and the failure of 114 Tenth Avenue to receive service of process due to its breach of its responsibility to keep a current address on file with the Secretary of State does not constitute a reasonable excuse to vacate the judgment (*Cedeno v. Wimbledon Bldg. Corp.*, 207 AD2d 297, 298 (1994), *lv dismissed* 84 NY2d 978 [1994]). 114 Tenth Avenue also otherwise failed to set forth a meritorious defense to the action.

Denial of the motion to renew was appropriate because contrary to 114 Tenth Avenue's position, *Jones v. Flowers* (547 US 220 [2006]), decided after submission of the original motion, did not constitute a change in the law that would alter the court's prior determination (CPLR 2221[e][2]). The instant circumstances are readily distinguishable from *Jones*, which concerned the sufficiency of notice provided to an individual by a state government of a tax deliquency and of an impending tax sale of the individual's property, whereas here, process was served by a private actor upon 114 Tenth Avenue pursuant to Business Corporation Law § 306. The holding in *Jones* does not address the constitutionality of service of process on the Secretary

of State as the designated agent of a corporation, nor is there any reason to believe that such service is unconstitutional. Furthermore, the new facts submitted by 114 Tenth Avenue in support of its motion to renew were readily available at the time the prior motion was made and 114 Tenth Avenue failed to provide a reasonable justification for failing to present these facts in support of its initial motion (CPLR 2221[e][3]; *Chelsea Piers Mgt. v. Forest Elec. Corp.*, 281 AD2d 252 [2001]).

We have considered 114 Tenth Avenue's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 30, 2007

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CLERK

APPENDIX B — ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT DATED FEBRUARY 26, 2008

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on February 26, 2008.

Present: Hon. Jonathan Lippman, Presiding Justice,
Richard T. Andrias
Milton L. Williams
John T. Buckley,
E. Michael Kavanagh, Justices.

M-6329
Index No. 109239/03

NYCTL 1999-1 Trust, et al.,

Plaintiffs-Respondents,

-against-

114 Tenth Avenue Assoc., Inc.,

Defendant-Appellant,

Karen Nason, et al.,

Defendants,

Carlton Capital Corp.,

Intervenor-Respondent.

Appendix B

Defendant-appellant having moved for reargument of or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this Court entered on October 30, 2007 (Appeal Nos. 1865-1866N),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTER:

s/ [illegible]
Clerk

APPENDIX C — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK: PART 51 FILED DECEMBER 20, 2006

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK: PART 51

Index No. 109239/03

NYCTL 1999-1 TRUST and THE BANK OF NEW YORK, as collateral Agent and Custodian for the NYCTL 1999-1 TRUST,

Plaintiffs,

-against-

114 TENTH AVENUE ASSOC., et al.,

Defendants.

DECISION AND ORDER

SARALEE EVANS, J.S.C.

Recitation, as required by CPLR § 2219[a], of the papers considered in review of this motion by defendant 114 Tenth Avenue Assoc. to renew its motion to vacate the judgment of foreclosure.

Amended Notice of Motion to
Renew, Affirmation & Exhibits.....1

Appendix C

Affirmation in Opposition to Renewal (Carlton) 2
Affirmation in Opposition to Renewal (Corp Counsel) 3
Affirmation in Opposition to Renewal (Donadio) 4

Defendant seeks to renew its' vacatur motion, asserting that the issue should be revisited in light of new and controlling law and additional relevant facts that were not available to it at the time of its emergency application. A motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." To the extent that new facts are offered, movant must further demonstrate that they are such that they were unavailable in the first instance.

Prior Proceedings

Defendant 114 Tenth Avenue Associates has owned the building at 457 West 17th Street since 1993. On March 25, 2002, its president Zvadin Krstic allegedly went to the Department of Finance (hereafter DOF), and, upon inquiry, was told by a Finance employee that the property was subject to a lien for delinquent payments but that payment of $11,338.28 would clear things up. Mr. Krstic paid the sum and allegedly made a further payment of $10,000 to the DOF on October 21, 2002. He returned to the DOF office on February 10, 2003, asked what he owed, and paid $17,596.65 again

allegedly on the advice of a DOF clerk. In the interim, a lien for unpaid taxes and other fees that had accumulated from 1999 to January, 2002 totaling $17,865.55, was certified by the City and transferred, on May 13, 2002, to NYCTL 1991-1 Trust, the plaintiff in this action.

Thereafter, plaintiff sued for a judgment of foreclosure and sale by serving defendant corporation on June 17, 2003, via the Secretary of State. The summons and complaint was forwarded by the Department of State to the address on file for 114 Tenth Avenue Assoc. and the envelope was returned marked "unclaimed."[1] A judgment of foreclosure was granted on defendant's default on March 1, 2005. Thereafter, a notice of sale was published in the Daily News and, on May 18, 2005, intervenor Carlton Capital Corp. purchased the building from plaintiff.

Defendant states that it first heard of the foreclosure on May 19th, and moved to vacate the judgment and sale by order to show cause on May 26, 2005, objecting that it had no notice of the proceeding and was prepared to pay all outstanding arrears. Defendant's president contended that he had no knowledge of the foreclosure proceeding and only learned of it when a tenant contacted him one day after the sale to intervenor Carlton Capital Corp. He asserts that the corporation

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1. It appears that defendant continued to make tax and other payments on September 22, 2003, May 20, 2004, and June 9, 2004.

failed to receive service in the foreclosure proceeding because he had moved and had neglected to provide the Secretary of State with a current address for service of process. This fact was confirmed by the Office of the Secretary of State, which provided a statement that the process mailed to the corporate defendant had been returned marked "unclaimed."

On September 12, in an order filed on September 22, 2005, this court declined to vacate the judgment in the absence of any allegation of error or wrongdoing on the part of plaintiff or the Department of Finance. Defendant now contends that a subsequent change in the law and new facts unavailable at the time of its initial motion warrant renewal of the application for vacatur.

Defendant's current legal challenge asserts that the United States Supreme Court in *Jones v. Flowers,* 126 S. Ct. 1708, decided on April 28, 2006 after submission of the original motion, establishes that the ineffective service of process upon defendant corporation via the Secretary of State deprived it of due process of law under the 14th Amendment. In *Jones v. Flowers, supra,* the court considered whether service by the Arkansas Commissioner of State Lands of notices of tax delinquency and subsequent sale, mailed to an individual taxpayer by certified mail, were constitutionally adequate notice of deprivation of the tax payer's property, when both notices were returned to the Commissioner by the Post Office marked "unclaimed".

The facts of that case are similar to those at bar, in that the taxpayer in *Jones* failed to maintain a current address with the Commissioner despite a legal obligation to do so. Here, Mr. Krstic explains that he failed to update the corporation's address on file with the Secretary of State when he moved in 1993, and that this resulted in the return of the forwarded process to the Secretary of State's office marked "unclaimed".

In evaluating the constitutional requirements of notice, the court in *Jones* noted that while Mr. Jones should have diligently kept his address up to date and should have paid his taxes timely, "before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking." The thrust of the due process ruling was not that actual notice was required, however, but that the Commissioner, after learning that notice was ineffective, was obliged to take reasonable follow up measures in response to the return of the certified letter.

Here, however, the Department of Finance, in serving process on the Secretary of State, was serving defendant's designated agent as provided in CPLR §311(a). Such service establishes jurisdiction over a corporation. Moreover, the Secretary of State did not notify the City that service did not accomplish notice, so that the question of a reasonable next step in light of proof of no notice is not raised in this case. Defendant's corporate status required that it designate the Secretary of State as its agent for the service of process.

That agent was served and the city never received any indication that service did not also provide defendant with notice of the proceeding being commenced. As this case is clearly distinguishable from *Jones v. Flowers, supra*, that case does not provide a basis for renewal of defendant's motion.

Defendant also contends that significant new facts unavailable to it at the time of the initial application necessitate renewal of the motion to vacate. One week after learning of the foreclosure sale, defendant's president sought vacatur on the ground that he had received no actual notice. In the months since that motion was denied, defendant has obtained city records revealing the manner in which defendant's tax payments made were credited to the various property taxes and other charges assessed against the property during the relevant three year period. Defendant asserts that those records reveal that payments been improperly credited.

According to defendant, the city's records reveal that the Department of Finance improperly credited tax payments to arrears that were the subject of an installment agreement, and credited other payments to currently due taxes rather than the oldest delinquent charges, in violation of the city's stated accounting practice. Defendant asserts that these errors resulted in the improper sale of the lien on the building in violation of City of New York Admin. Code § 11-319.

Corporation Counsel, appearing on behalf of the purchaser of the building, contends that the information

regarding the application of defendant's tax payments to the liabilities posted was available to defendant at the time of the original motion. Margaret Donadio, the Tax Lien Ombudsman for the Department of Finance states that this information is generally available on the Department of Finance's website. She further states, however, that after payments are made either by the taxpayer or by a lien purchaser, the records are purged from the web site. Full records including periods that have been purged, are maintained by the city, however, and are available from the mainframe computer upon request, either by telephone or letter.

Defendant's business manager describes in detail her efforts to locate and obtain the taxpayer's own bank records but there is no showing that the city records were sought either before or for several months after the court's initial decision. In the absence of any evidence that the records on which defendant relies were unavailable at the time of defendant's initial motion, the motion to renew the court's prior decision is denied.

This constitutes the decision and order of the court. Any issues raised by the parties and not addressed in this decision have nevertheless been considered and are denied.

Dated: December 11, 2006
New York, NY

s/ Saralee Evans
SARALEE EVANS, J.S.C.
HON. SARALEE EVANS

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY FILED SEPTEMBER 22, 2005

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: *Saralee Evans* PART *51*
Justice

INDEX NO. *109239/03*

MOTION SEQ. NO. *3*

NYCTL 1999-1 Trust

v.

114 Tenth Avenue Assoc., Inc.

* * *

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause/Affidavits – Exhibits . . .	*1, 2, 3, 4*
Answering Affidavits – Exhibits	*5, 6, 7*
Replying Affidavits	*8, 9*

Cross-Motion: ☑ Yes

Appendix D

Upon the foregoing papers, it is ordered that this motion

Zvadin Krstic, owner of defendant 114 Tenth Avenue Assoc., Inc., moves to set aside the foreclosure sale of his building, sold at auction to cross movant Carlton Capital Corp., on May 18, 2005, for $2,000,000. He seeks the equitable intervention of the court, stating that he was not served with notice of the foreclosure action and that he is prepared to pay the back taxes owed. The motion was filed on May 26, 2005. Purchaser Carlton Capital Corp. filed a cross motion seeking to intervene pursuant to CPLR § 1012(a)(3) as an entity that may be adversely affected by the court's ruling. Movant does not object to intervention, and that portion of the cross motion is therefore granted without opposition.

Defendant states that he was unaware of the foreclosure action until after the sale had taken place. He alleges that he no longer resides at the address listed with the Secretary of State for service of process upon the corporate owner and that he did not receive notice of the proceedings. He urges that his former girlfriend was improperly treated as a building owner and served in his stead. She was served, however, not as an owner but because she holds a mortgage on the building to secure Mr. Krstic's payment to her of child support for their son.

"A court may exercise its equitable powers to set aside a judicial sale only where fraud, collusion, mistake, or exploitive overreaching cases suspicion on the

fairness of the sale." *Otto Gerdau Co. v. Anasac Realty Corp.*, 251 AD2d 174 (1st Dept. 1998) quoting *Crossland Mtge. Corp. v. Frankel*, 192 AD2d 571, 572 (1993); *NYCTL 1996-1 Trust v. LJF Realty Corp.*, 307 AD2d 957 (2d Dept. 2003). Here, defendant's failure to provide the Secretary of State with his correct address may have prevented actual delivery. Actual receipt of papers, however, is generally irrelevant to whether service is proper. *Raschel v. Rish*, 69 NY2d 694, 697 (1983). Absent evidence of wrongdoing this court is without discretion to set aside the foreclosure sale. For the foregoing reasons, the motion is denied and the cross motion granted.

Dated: *9/12/05* s/ *Saralee Evans*
J.S.C.

Check one: ☑ FINAL DISPOSITION

APPENDIX E — ORDER OF THE STATE OF NEW YORK, COURT OF APPEALS DATED FEBRUARY 19, 2008

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of February 2008

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 179 SSD 6

NYCTL 1999-1 Trust, et al.,

Respondents,

v.

114 Tenth Avenue Assoc., Inc.,

Appellant,

Karen Nason, et al.,

Defendants,

Carlton Capital Corp.,

Intervenor-Respondent.

Appendix E

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

APPENDIX F — ORDER OF THE STATE OF NEW YORK, COURT OF APPEALS DATED JUNE 3, 2008

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the third day of June 2008

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 391

NYCTL 1999-1 Trust, et al.,

Respondents,

v.

114 Tenth Avenue Assoc., Inc.,

Appellant,

Karen Nason, et al.,

Defendants,

Carlton Capital Corp.,

Intervenor-Respondent.

Appendix F

A motion having heretofore been made herein upon the part of the appellant for reconsideration of this Court's February 19, 2008 dismissal order, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

APPENDIX G — PROVISIONS OF THE NEW YORK BUSINESS CORPORATIONS LAW

The following provisions of the New York Business Corporations Law, quoted in relevant part, are involved herein:

§ 304. Statutory designation of secretary of state as agent for service of process

(a) The secretary of state shall be the agent of every domestic corporation and every authorized foreign corporation upon whom process against the corporation may be served.

§ 306. Service of process

(b)(1) Service of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by personally delivering to and leaving with the secretary of state or a deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such corporation shall be complete when the secretary of state is so served. The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such corporation, at the post office address, on file in the department of state, specified for the purpose.

Appendix G

§ 308. Records and certificates of department of state

The department of state shall keep a record of each process served upon the secretary of state under this chapter, including the date of service. It shall, upon request made within ten years of such service, issue a certificate under its seal certifying as to the receipt of the process by an authorized person, the date and place of such service and the receipt of the statutory fee.

APPENDIX H — PROVISIONS OF THE NEW YORK CITY ADMINISTRATIVE CODE

The following provisions of the New York City Administrative Code, quoted in relevant part, are involved herein:

§ 11-319. Sales of tax liens.

(b)(2)(i) The commissioner of finance may, in his or her discretion, sell a tax lien or tax liens through a negotiated sale . . . . provided, however, that if the negotiated sale is to a trust or other entity created by the city or in which the city has an ownership or residual interest, then the requirement that the notice advise that a request for statements of interest is available at the office of the department of finance shall not apply.

§ 11-332. Rights of purchaser of tax lien.

(a) Any purchaser of a tax lien or tax liens shall stand in the same position as the city and shall have all the rights and remedies that the city would have had if the tax lien or tax liens had not been sold.

§ 11-335. Foreclosure of tax liens.

If the amount of any tax lien which shall have been transferred by a tax lien certificate shall not be paid when . . . due, the holder of such tax lien certificate may maintain an action in the supreme court to foreclose such tax lien. . . . Except as otherwise provided in this chapter an action to foreclose a tax lien shall be regulated by

the provisions of the civil practice law and rules and by all other provisions of law, and rules of practice applicable to actions to foreclose mortgages on real property.

§ 11-340. Effect of judgment foreclosing tax lien.

. . . So much of section three hundred seventeen of the civil practice law and rules as requires the court to allow a defendant to defend an action after final judgment shall not apply to an action to foreclose a tax lien.

§ 11-347. Corporation counsel to protect city in all proceedings relating to tax liens.

It shall be the duty of the corporation counsel to protect the interest of the city in all matters, actions and proceedings relating to tax liens and tax lien certificates; to intervene on behalf of the city or to make the city a party to any action in which the corporation counsel believes it to be to the interest of the city so to do, by reason of any matter arising under or relating to any tax lien or tax lien certificate, or advertisement of sale of tax liens. The corporation counsel in his or her discretion may represent the purchaser of a tax lien or the holder of a tax lien certificate in any action in which the corporation counsel believes it to be in the interest of the city so to do, by reason of any matter arising under or relating to any tax lien or tax lien certificate, or advertisement of sale of tax liens. All costs recovered in any action or proceeding conducted or defended by the corporation counsel pursuant to this section shall belong to the city and shall be collected, applied and disposed of in the same manner as are other costs recovered by the city.